BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Applications of Tribune Media Company and Sinclair Broadcast Group For Consent to Transfer Control of Licenses and Authorizations	)	MB Docket No. 17-179

COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

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COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association ("NCTA") files these comments in response to the April Amendment to the Comprehensive Exhibit ("April Amendment")[1] submitted by Sinclair Broadcast Group, Inc. ("Sinclair") and Tribune Media Company ("Tribune") (collectively, "Applicants") in the above-captioned proceeding, and in particular to Sinclair's request to own two top-four stations in St. Louis and Indianapolis. NCTA urges the Commission to reject Sinclair's request. The proposed combinations would put significant upward pressure on retransmission consent fees to the detriment of the public and multichannel video programming distributors ("MVPDs"), and Sinclair has failed to meet its burden of demonstrating that the combined holdings do not present public interest harms or offer potential public interest benefits that outweigh any potential harms.

The Commission should also ensure that the stations it requires Sinclair to divest to meet the broadcast ownership rules are sold to arms-length buyers who will exercise *de facto* as well as *de jure* control over the stations, and should be prepared to actively monitor such sales, if approved, on a going-forward basis to ensure ongoing compliance with the Commission's rules.[2] This oversight is warranted in light of the enhanced risk of consumer and competitive harm presented by this transaction arising out of the unprecedented reach of the combined entity and Sinclair's past conduct in flouting of the Commission's ownership rules.

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[1] *See* Applicants' Amendment to Comprehensive Exhibit, MB Docket No. 17-179 (filed Apr. 24, 2018) ("April Amendment").

[2] Sinclair currently owns at least seven stations that multicast more than one of the four major broadcast networks on its digital signal. The Commission should ensure that, as part of any divestitures, Sinclair divests one of its affiliations with a "top four" network. *See* NCTA Reply Comments, MB Docket No. 17-179 (filed Aug. 29, 2017), at 14-15 ("NCTA Reply Comments").

I. INTRODUCTION AND SUMMARY

The proposed combination of Sinclair and Tribune would create a broadcast colossus of unprecedented size, scope, and reach. As currently proposed, Sinclair would own more than 200 stations in 102 markets reaching approximately 60 percent of all households nationwide, including stations in many of the major markets.[3] In addition to stations that Sinclair currently owns or would own if the transaction is approved, the Applicants both currently exercise substantial operational control over almost 50 stations through joint sales agreements ("JSAs"), local marketing agreements ("LMAs") and shared services agreements ("SSAs") entered into with the stations' beneficial owners.[4]

Sinclair's holdings post-merger will give it exceptional leverage in business dealings with MVPDs, programming suppliers, and advertisers. Without appropriate guardrails in place, Sinclair will be uniquely positioned to exercise this leverage to the detriment of consumers and competition. To mitigate these adverse effects insofar as possible, the Commission must strictly apply its media ownership rules to Sinclair.

At a minimum, this means that the Commission should deny Sinclair's request to own two top-four stations in St. Louis and Indianapolis. As the attached declaration of Drs. Bryan Keating and Jon Orszag demonstrates,[5] Sinclair's ownership of two top-four stations in St. Louis and Indianapolis would give it market power in retransmission consent negotiations that is equal to or greater than in markets where Sinclair has already agreed to divest a top-four station. The

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[3] *See* Austen Hufford, *Sinclair to Raise $1.5 Billion by Selling Stations*, Wall. St. J., May 9, 2018, https://www.wsj.com/articles/sinclair-to-raise-1-5-billion-from-station-divestitures-1525874141.

[4] Sinclair has sidecar agreements with 46 stations. *See* Sinclair Broadcasting Group, Inc., Annual Report (Form 10-K) at 7-9 (Mar. 1, 2018). Tribune has sidecar agreements with three stations. Tribune Media Co., Annual Report (Form 10-K) at 11 (Mar. 1, 2018).

[5] Declaration of Bryan Keating and Jon Orszag ("Keating/Orszag Declaration"), attached hereto as Attachment A.

exercise of this market power would result in higher retransmission consent fees that would ultimately be borne by consumers.

Sinclair's top-four showing for St. Louis and Indianapolis summarily dismisses the retransmission consent harms associated with Sinclair's ownership of multiple top-four stations in those markets—harms the Commission has long recognized and recently affirmed continue to exist—offering no evidence at all that these harms are outweighed by the benefits of the proposed transaction. The Commission should therefore reject Sinclair's request and require it to divest one of the top-four stations in each of these markets. Regardless of whether divestitures in St. Louis or Indianapolis are required as a matter of antitrust law, Sinclair has failed to make the showing required by the Commission that the St. Louis and Indianapolis combinations are warranted under the Communications Act's public interest standard. Granting Sinclair's request based on such a flimsy showing would make the Commission's Top-Four Prohibition and the public interest standard effectively meaningless.

The risk of retransmission consent harms would be exacerbated by the unprecedented national reach created by this transaction. In St. Louis and Indianapolis, and in every other market where Sinclair owns a station or stations, its national footprint would enable it to demand higher fees by withholding retransmission consent for cable operators and other MVPDs that refuse to agree to such retransmission consent demands. Sinclair's April Amendment raises significant questions as to whether its proposed divestitures will ameliorate this risk. Many of the stations will be sold at below-market prices either to an entity controlled by family members of Sinclair's controlling shareholder, or to entities closely allied with Sinclair that have no independent broadcasting experience. Management and option agreements between some of the divested stations and Sinclair will tie these stations even more closely to Sinclair.

Given the totality of these circumstances, the Commission must satisfy itself that the divestitures are truly arms-length in nature and that Sinclair will not retain *de facto* control of the stations. The Commission should also monitor the divested stations on an ongoing basis, if the sales are approved, to ensure that the buyers actually exercise full control over the stations and should consider enforcement actions if this proves not to be the case.

II. SINCLAIR HAS NOT MET ITS BURDEN TO DEMONSTRATE THAT THE HARMS ASSOCIATED WITH OWNERSHIP OF TWO TOP-FOUR STATIONS IN ST. LOUIS OR INDIANAPOLIS ARE MINIMAL OR OUTWEIGHED BY ANY PURPORTED BENEFITS.

In the *Quadrennial Review Reconsideration Order*, the Commission retained its prohibition on common ownership of multiple top-four broadcast stations within a DMA (the "Top-Four Prohibition").[6] Nonetheless, the Commission gave applicants an opportunity to request a case-by-case examination of a proposed combination that would otherwise be prohibited. Applicants seeking approval of such a transaction "must demonstrate that the benefits of the proposed transaction would outweigh the harms," and that the application of the Top-Four Prohibition is not in the public interest with respect to the specific transaction "because the reduction in competition is minimal and is outweighed by public interest benefits."[7] The Commission pledged that it would "undertake a careful review of such showings in light of the record with respect to each such application."[8]

The Commission should deny Sinclair's request to own two top-four stations in St. Louis and Indianapolis because Sinclair has failed to establish that the harms resulting from reduced

[6] *In re 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802, 9839 ¶ 78 (2017) ("*Quadrennial Review Reconsideration Order*").

[7] *Id.* at 9839 ¶ 82.

[8] *Id.*

competition in those markets are minimal or that the public interest will be served by its common ownership of these stations. In particular, as the Commission has explained, allowing such combinations as Sinclair proposes "would generally result in a single firm's obtaining a significantly larger market share than other stations and reduced incentives for commonly owned local stations to compete for programming, advertising, and audience shares."[9] The proposed combinations would give Sinclair significant leverage to raise retransmission consent fees in those markets and nationwide. Because Applicants have failed to address the retransmission consent harms in any meaningful way, let alone shown that such harms are "minimal," the Commission lacks any basis for approving the requested exceptions to the Top-Four Prohibition. As demonstrated below, moreover, no such showing is possible given the increase in market power that Sinclair would enjoy if it owned both top-four stations in each of these markets.

The *Quadrennial Review Reconsideration Order* describes the types of information that applicants could provide to justify an exception to the Top-Four Prohibition, such as ratings share data, revenue share data, and characteristics of the market served by the stations subject to the requests.[10] The Commission noted that the list of categories was non-exclusive, however, and expressly declined to articulate "a rigid set of criteria for our case-by-case analysis."[11] While the Commission declined to adopt specific criteria related to the issue of retransmission consent, it expressly provided the opportunity for parties "to advance any relevant concerns—

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[9] *Id.* at 9837 ¶ 79 n.230.

[10] *Id*. at 9838-39 ¶ 82 ("Such information regarding the impacts on competition in the local market could include (*but is not limited to*): (1) ratings share data of the stations proposed to be combined compared with other stations in the market; (2) revenue share data of the stations proposed to be combined compared with other stations in the market, including advertising (on-air and digital) and retransmission consent fees; (3) market characteristics, such as population and the number and types of broadcast television stations serving the market (including any strong competitors outside the top-four rated broadcast television stations); (4) the likely effects on programming meeting the needs and interests of the community; and (5) any other circumstances impacting the market, particularly any disparities primarily impacting small and mid-sized markets.") (emphasis added).

[11] *Id*.

including concerns related to retransmission consent issues—in the context of a specific proposed transaction if such issues are relevant to the particular market, stations, or transaction."[12]

This transaction raises such concerns, and Sinclair has failed to address them. As a threshold matter, a broadcaster negotiating retransmission consent agreements for multiple stations in a market has greater leverage over an MVPD in those negotiations than the owner of a single station in that market. If subscribers view certain local broadcast stations as at least partial substitutes for one another, then subscribers may be more inclined to stay with an MVPD even if it fails to reach an agreement with a particular viewer's preferred broadcast station as long as it has reached agreement with other stations in the market. If an MVPD loses access to multiple stations, however, there is a greater chance some customers will cancel their MVPD subscription in search of an alternative MVPD offering more robust alternatives. As Keating and Orszag observe, economic theory makes the unambiguous prediction that the merger will enhance the bargaining power of the commonly-owned broadcast stations relative to MVPDs.[13]

The negotiating leverage derived from common ownership of multiple stations within a market applies with particular force to negotiations with top-four broadcast stations. Such stations are typically affiliated with the most popular networks, and subscribers are likely to view the stations as partial substitutes for one another. Failure to reach agreement with two top-four broadcast stations would force some subscribers to view their third-choice station, making them more likely to switch MVPDs. In other words, MVPDs are disproportionately worse off if they carry only two of the top-four broadcast stations in a market rather than carrying three or four of

[12] *Id.* at n.239.

[13] Keating/Orszag Declaration ¶ 14.

the top-four-ranked stations. Recognizing the likely upward pressure on retransmission consent fees that would be created by this asymmetry, the Commission barred joint retransmission consent negotiations by two top-four stations in the same market unless they are commonly owned.[14] Congress later extended this ban to joint negotiations of any two non-commonly-owned stations in the same market.[15]

Remarkably in light of this history, Sinclair's April Amendment dismisses the relevance of the proposed combinations on retransmission consent negotiations.[16] Sinclair argues that local retransmission revenues for larger television groups are not reflective of "competition in the market" because they are "negotiated on a national, not a local, level."[17] It also asserts that revenues "are not a result of competition between individual stations in a market and are largely dependent on a number of factors . . . that are wholly unrelated to local broadcast station competition or any particular station being examined.[18]

As the Keating/Orszag Declaration demonstrates, however, the argument that local competitive conditions are irrelevant to retransmission consent negotiations is "inconsistent with sound economics."[19] Prevailing economic theory dictates that the "elimination of horizontal competition between broadcast stations would put upward pricing pressure on retransmission consent rates."[20] Contrary to Sinclair's contention that retransmission consent agreements negotiated at a national level are not affected by local competition, "[r]ates set at a national level

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[14] *In re Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351, 3358-59 ¶ 13 (2014).

[15] 47 U.S.C. § 325(b)(3)(C)(iv).

[16] *See* April Amendment at 8 n.32.

[17] *See id.*

[18] *Id.*

[19] Keating/Orszag Declaration ¶ 17.

[20] *Id.* ¶ 18.

reflect the economic implications of local competitive conditions, along with other factors relevant to pricing."[21]

The Department of Justice ("DOJ") has previously reached a similar conclusion. In the Nexstar-Media General transaction, the DOJ found that Nexstar's proposed acquisition of Media General would "diminish competition in the negotiation of retransmission agreements with MVPDs" because Nexstar would have the ability to simultaneously threaten to black out stations affiliated with at least two major broadcast networks—its own and Media General's—in the markets where the two companies were direct competitors.[22] Consequently, the DOJ found that the loss of a competitive threat between Nexstar and Media General in their overlapping markets "would likely lead to an increase in retransmission fees in those markets," which in turn would lead to higher subscription fees given that retransmission fees are passed on to consumers.[23] Data that DISH Network submitted in this docket likewise support the conclusion that combining competing stations within a DMA under common ownership would shift bargaining power toward the broadcast station owner.[24]

Thus, in order to fully evaluate whether the alleged benefits of Sinclair's ownership of two top-four stations in St. Louis and Indianapolis outweigh the harms to the public interest, the Commission must consider the impact of such ownership on retransmission consent costs. Based even on the limited information Sinclair has provided in its filing, it is clear that the proposed combinations would put upward pressure on retransmission consent fees in each of these

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[21] *Id.* & n.17.

[22] *United States v. Nexstar Broadcasting Group, Inc. and Media General, Inc.*, Competitive Impact Statement, Sept. 2, 2016 at 8, https://www.justice.gov/atr/case-document/file/910661/download.

[23] *Id.* at 9.

[24] Keating/Orszag Declaration ¶ 21 & n.21 (rebutting Sinclair's response to DISH's conclusion).

markets, and thus to such fees overall given national pricing, to the detriment of consumers.[25] Limiting Sinclair to a single top-four station in St. Louis and Indianapolis, as it will be in every other market, is the only result that serves the public interest in a competitive marketplace for retransmission consent negotiations.

St. Louis. In St. Louis, Sinclair currently owns KDNL-TV, the ABC affiliate. Tribune owns KPLR-TV, the CW affiliate, and KTVI-TV, the FOX affiliate. Sinclair is proposing to divest either KDNL or KPLR and to retain KTVI, subject to ongoing negotiations with the DOJ.[26] The competitive impact of either combination on the market for licensing broadcast programming to MVPDs can be assessed using the Hirschman-Herfindahl Index ("HHI"), a standard measure of market concentration that considers the strength of other competing options. Using retransmission fee data from SNL Kagan, Keating and Orszag calculated that the combination of KDNL and KTVI would yield an HHI of 3489, an increase of 925 over the current HHI.[27] This result is far in excess of the threshold by which the *Horizontal Merger Guidelines* consider a merger to be presumptively anticompetitive,[28] and thus strongly indicates

[25] Keating/Orszag Declaration ¶ 22. As Sinclair's May 29 response to the Media Bureau's information request shows, consumers in the Indianapolis and St. Louis markets have already been experiencing explosive increases in retransmission consent fees; from 2014 to 2017 retransmission consent revenue grew by over 112 percent in the Indianapolis DMA and 73 percent in the St. Louis DMA. *See* Letter from Miles S. Mason, Pillsbury Winthrop Shaw Pittman LLP, Counsel for Sinclair Broadcast Group, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-179, at 4, 11 (May 29, 2018). Indeed, as Keating and Orszag write, "The likely increases in retransmission consent fees arising from the proposed transaction, as described further below and to the extent that they are not remedied by divestitures, would exacerbate existing trends. Over the past decade, total retransmission consent fees have grown substantially, from about $200 million in 2006 to about $8 billion in 2016 (and are projected to reach $10 billion in 2018)." Keating/Orszag Declaration ¶ 15 (citing Justin Nielson, "Retrans projections update: $12.8B by 2023," *SNL Kagan Broadcaster Investor*, June 14, 2017).

[26] *See* Applicants' Comprehensive Exhibit, File No. BALCDT-20180514ABW (filed May 15, 2018), at 2 ("In order to comply with the Duopoly Rule in the St. Louis DMA, the parties will be required to divest either KDNL-TV or KPLR-TV in the St. Louis market.").

[27] The current HHI of 2564 is calculated assuming the common ownership of KTVI and KPLR and the independent ownership of KDNL. *See* Keating/Orszag Declaration ¶ 27, Table 3.

[28] U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*§ 5.3 (Aug. 19, 2010) ("*Horizontal Merger Guidelines*"), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

that Sinclair would be able to exercise market power in the negotiation of retransmission consent agreements for these two stations. At a minimum, Sinclair should not be permitted to own both of these stations.

Even if Sinclair divested KDNL and acquired the two stations already owned by Tribune in St. Louis, Sinclair would enjoy substantial market power in the joint negotiation of retransmission consent agreements given the fluidity of KPLR's ratings, which places the station among the top-four along with Tribune's FOX affiliate.[29] In fact, at the time of Sinclair's April Amendment, KPLR was the fourth-highest rated station in the market.[30] Sinclair has already announced its intent to raise Tribune's retransmission consent fees, among the lowest among station groups,[31] to Sinclair's rate.[32]

While the KTVI-KPLR combination predates this transaction, the Commission never evaluated it under its Top-Four Prohibition in effect at the time because KPLR was not a top-four station at the time Tribune acquired KTVI in 2013.[33] In any event, Sinclair now seeks approval to retain this combination under the Commission's current Top-Four rules and so the Commission must evaluate the combination under those rules. In light of the substantial market power it would confer on Sinclair—and Sinclair's utter failure to provide the showing required

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[29] *See* April Amendment at 13.

[30] *See id.* at 12.

[31] *See* S&P Global Market Intelligence, Economics of Broadcast TV Retransmission Revenue 16 (2017 ed.) ("Average monthly retrans per sub fees, Q1 2016 - Q1 2017").

[32] *See* Diana Marszalek, *Sinclair, Tribune CEOs Push Advantage of Sizing Up*, Broadcasting & Cable (May 22, 2017), http://www.broadcastingcable.com/news/local-tv/sinclair-tribune-ceos-push-advantage-sizing/166006; *see also* Sinclair Broadcast Group, Investor Presentation at Slide 7 (May 8, 2017), http://sbgi.net/wp-content/uploads/2017/05/Sinclair_Tribune-Media-Investor-Presentation_vF.pdf (indicating that for net retransmission revenue there would be "[i]mmediate contracted step-ups to Sinclair's rates").

[33] *See In re Applications of Local TV Holdings, LLC, Transferor and Tribune Broadcasting Co. II, LLC, Transferee*, File No. BTCCDT-20130715AFA (filed July 15, 2013), Transferee Exhibit 20.

by the Commission's rules—the Commission must reject Sinclair's request and bar it from holding either of the proposed top-four combinations in St. Louis.

Indianapolis. Sinclair's ownership of WTTV-TV and WXIN-TV in Indianapolis is equally troubling. While Sinclair does not currently operate any stations in this market, the combined ownership of these two stations yields an HHI of 3068 in the market for licensing broadcast programming to MVPDs using retransmission consent revenue. As in St. Louis, the HHI in Indianapolis exceeds the *Horizontal Merger Guidelines'* threshold by which a merger is considered to be presumptively anti-competitive.[34] Divesting one of the stations would reduce the HHI by 1062, to 2006, based on retransmission consent revenue, resulting in only a moderately concentrated marketplace under the *Horizontal Merger Guidelines*.[35]

As in St. Louis, Tribune's Indianapolis duopoly predates the current transaction, but the Commission never had the opportunity to review Tribune's initial acquisition of this duopoly here—because the combination was the result of an affiliation swap that did not trigger Top-Four review at the time.[36] The Commission closed this loophole in 2016,[37] and Sinclair should not simply be allowed to step into Tribune's shoes. Sinclair itself acknowledges that its request to retain the combination must be justified under the standards adopted in the *Quadrennial Review*

[34] Keating/Orszag Declaration ¶ 29.

[35] *Id.*

[36] *See* Cynthia Littleton, *CBS Switches Indianapolis Affiliation in Tribune Pact, Bumping CW to Digital Channel*, Variety, Aug. 11, 2014, http://variety.com/2014/tv/news/cbs-switches-indianapolis-affiliation-in-tribune-pact-bumping-cw-to-digital-channel-1201279881/.

[37] *In re 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Second Report and Order, 31 FCC Rcd. 9864, 9885 ¶ 52 (2016).

Reconsideration Order.[38] As set forth herein, under those standards, the Commission cannot approve the combination.[39]

Significantly, the market impact of joint ownership of stations in St. Louis and Indianapolis is essentially indistinguishable from the eight other markets where Sinclair has agreed to divest stations, measured by post-merger HHI. Indeed, St. Louis and Indianapolis both fall within the middle range of market concentration based on HHI calculations—not even at the low end—compared with other markets where Sinclair and Tribune's ownership of top-four stations overlap.[40] Accordingly, Sinclair should be limited to a single top-four station in St. Louis and Indianapolis, as it has agreed in the other markets. Regardless of whether divestitures in St. Louis or Indianapolis are required as a matter of antitrust law, Sinclair has failed to make the showing required by the Commission that the St. Louis and Indianapolis combinations are warranted under the Communications Act's public interest standard.

Sinclair's arguments in support of retaining two top-four stations in these markets are wholly unavailing against the retransmission consent harms described above. Its top-four showings regarding competition with cable systems are not unique to the St. Louis and Indianapolis markets, as cable networks compete in markets throughout the country, including in the markets where Sinclair is planning to divest a top-four station.[41] Moreover, as noted earlier, Sinclair does not even attempt to deny that the proposed combinations would give it enhanced leverage in retransmission consent negotiations. Sinclair's arguments in support of its request to

[38] *See* April Amendment at 5-6.

[39] Tribune also owns satellite station WTTK(TV), a CBS affiliate licensed to Kokomo, Indiana, which offers strong market coverage, including in the Indianapolis metropolitan area. *See id.* at 5 n.20. The Commission should ensure that Sinclair is unable to change this satellite station in a manner that would circumvent the Commission's decisions or the ownership rules.

[40] Keating/Orszag Declaration ¶ 31 & Figure 1.

[41] *Id.* ¶ 33.

own top-four duopolies in St. Louis and Indianapolis therefore "lack a sound economic foundation" and should be rejected.[42]

Finally, Sinclair's ownership of two top-four stations in St. Louis and Indianapolis will escalate the risk of consumer and competitive harm across the country because the stations would now be part of the larger Sinclair national footprint. Broadcaster size can often be positively correlated with broadcaster bargaining power, as a loss of broadcast stations across a significant part of an MVPD's footprint could disproportionally impose higher costs on the MVPD.[43] Such costs could include higher customer service expenses to respond to the loss of programming or payments to protect the brand as a result of adverse publicity.[44] Because these costs place an MVPD in a weaker bargaining position relative to a broadcaster, there is an incentive for an MVPD to agree to higher retransmission consent fees to avoid these costs, which only are expected to increase as the broadcaster increases in size.[45] While Sinclair has dismissed the impact of a larger national footprint on retransmission consent negotiations, DISH Network's filing in this proceeding provides empirical evidence to demonstrate that allowing Sinclair to increase its national footprint will result in higher retransmission consent fees.[46]

III. THE COMMISSION MUST ENSURE THAT SINCLAIR SELLS ITS DIVESTED STATIONS TO ARMS-LENGTH BUYERS WHO WILL EXERCISE *DE FACTO* AS WELL AS *DE JURE* CONTROL OVER THE STATIONS.

As explained above, Sinclair's retransmission consent leverage will be exacerbated by the unprecedented national reach of the post-merger entity. Given this increased leverage, the

[42] *Id.* ¶ 32.

[43] *Id.* ¶ 35.

[44] *Id.*

[45] *Id.*

[46] *Id*. ¶¶ 37-38.

Commission should ensure that the stations Sinclair divests are sold to arms-length buyers. Without such protections, Sinclair will have the ability to circumvent the Commission's ownership rules and a concomitant increased ability to improperly use the agreements as an end-run around the Commission's joint-negotiation rules.

Sinclair's current divestiture plan includes the sale of six stations to buyers that are closely allied with Sinclair management, raising the distinct prospect that Sinclair will be able to control these stations even after they are sold to other entities.[47] For instance, the buyer of WGN-TV in Chicago, "WGN-TV, LLC,"[48] is owned by Steven Fader, who reportedly has no broadcast experience but whose Atlantic Automotive Corporation, which owns automobile dealerships and a car leasing company, is controlled by Sinclair Executive Chairman David Smith.[49] The buyer of KUNS in Seattle, WA, KMYU in Salt Lake City, UT, and KAUT in Oklahoma City, OK is Howard Stirk Holdings, which is controlled by media personality Armstrong Williams, whose stations serve as sidecars to Sinclair.[50] The buyer of KDAF in Dallas, TX and KIAH Houston, TX is Cunningham Broadcasting Corporation, which operates

[47] News Release, Sinclair Broadcasting Group, Inc., Sinclair Provides Additional Information about Agreements to Sell TV Stations Related to Closing Tribune Media Acquisition (May 9, 2018), http://sbgi.net/wp-content/uploads/2018/05/Divestitures-Announcement-FINAL.pdf.

[48] *Id*.

[49] *See* Todd Shields, *Sinclair Station Buyers in Tribune Deal Would Have Company Ties*, Bloomberg, Mar. 2, 2018, https://www.bloomberg.com/news/articles/2018-03-02/sinclair-station-buyers-in-tribune-deal-would-have-company-ties; Hamza Shaban, *Why Sinclair's Latest Plan to Sell Major TV Stations has Critics Crying Foul*, Washington Post, Mar. 14, 2018, https://www.washingtonpost.com/news/the-switch/wp/2018/03/14/why-sinclairs-latest-plan-to-sell-major-tv-stations-has-critics-crying-foul/?utm_term=.7bf5c2dca356.

[50] In March 2018, Howard Stirk Holdings acquired stations in Flint, MI and Myrtle Beach, SC from Sinclair. *See* Press Release, Howard Stirk Holdings, Williams Purchases TV Stations (Mar. 20, 2018), http://www.hsh.media/company-news/2018/3/20/armstrong-williams-purchases-tv-stations. Howard Stirk Holdings acquired KVMY in Las Vegas, NV from Sinclair in 2015, and WCIV in Charleston, SC from Sinclair in 2014. *See* Press Release, Howard Stirk Holdings, Howard Stirk Acquires KVMY Las Vegas (Feb. 4, 2015), http://www.hsh.media/company-news/2015/2/4/howard-stirk-acquires-kvmy-las-vegas; Press Release, Howard Stirk Holdings, Howard Stirk Holdings Grabs WCIV for $50,000 (Sept. 17, 2014), http://www.hsh.media/company-news/2014/9/17/howard-stirk-holdings-grabs-wciv-for-50000.

16 other stations jointly with Sinclair under JSAs and SSAs, and is controlled by Michael Anderson, David Smith's former banker.[51]

The extensive and well-established connections between Sinclair and the buyers of these stations raises questions about whether Sinclair will remain in *de facto* control of at least some of these stations and thus in violation of the ownership rules or the requirement that the licensee retain control of a station's core operations. The lack of independent broadcasting experience by the purchasers identified above raises further questions about whether Sinclair will be able to exercise undue influence over the divested stations. And the reportedly below-market prices being paid by Howard Stirk Holdings and Cunningham Broadcasting for the stations they are acquiring raise yet more questions about whether these are bona fide sales.[52]

Sinclair's updated ownership filing also shows that after the closing of the deal, Sinclair plans to enter into JSAs and SSAs with WGN-TV LLC and Howard Stirk Holdings, as well as options to repurchase, at below-market prices, the stations that Sinclair is selling to these entities.[53] Not only are the buyers close business associates of Sinclair leadership, but they appear to be giving significant control of the divested stations back to Sinclair and suggesting, with the repurchase rights, that the "sale" of these stations is only temporary—to last only until

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[51] *See* Keach Hagey, *Sinclair Draws Scrutiny Over Growth Tactic*, Wall St. J., Oct. 20, 2013, https://www.wsj.com/articles/sinclair-draws-scrutiny-over-growth-tactic-1382321755; *In re Application of Michael Anderson, Trustee, Carolyn C. Smith Cunningham Trust to Michael Anderson*, File No. BALCDT-20171211ACN (filed Dec. 11, 2017), Description of Transaction. A fourth buyer, Standard Media Group LLC, was recently established by investment advisor Standard General L.P., apparently for the purpose of purchasing nine of the divested stations. Press Release, Standard Media Group LLC, Standard Media Group LLC acquires 9 television stations from Sinclair Broadcast Group, Inc. (undated), http://www.standardmedia.com/standard-media-group-llc-acquires-9-television-stations-from-sinclair-broadcast-group-inc/. While Standard Media's CEO is described as having broadcast experience, the ability of this new entity to manage the acquired stations is untested.

[52] *See* Jason Schwartz, *Armstrong Williams got 'sweetheart' deal from Sinclair*, POLITICO, June 13, 2018, https://www.politico.com/story/2018/06/13/sinclair-broadcasting-armstrong-williams-642997 (reporting that Howard Stirk is paying $4.95 million for stations with an estimated market value of ten times that amount, and that the price paid by Cunningham was as much as $40 million below market).

[53] *See, e.g.*, April Amendment at 20 n.72.

Sinclair is no longer prohibited by the Commission's ownership rules from owning them again outright. These arrangements raise further questions about the arms-length nature of these sales. The option agreements associated with the sale of KUNS and KMYU,[54] which are currently owned by Sinclair, may also violate the Commission's ban on reversionary interests by station sellers.[55]

The totality of these circumstances requires the Commission to ensure that the purchasers—and not Sinclair—will acquire and exercise *de facto* as well as *de jure* control of the stations, as required by the Commission's rules. To the extent the sales are approved, the Commission must also monitor the stations for ongoing compliance with the rules and conduct enforcement actions as appropriate. There is precedent for the Commission conducting such an exacting review, involving a prior Sinclair divestiture. In that case, the Commission noted that, while it does not traditionally examine the purchase price of a station sale, it will "consider such matters where it appears from other facts that the arrangement may not have been an arms-length transaction between the parties."[56] After conducting its review, the Commission concluded that

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[54] *See, e.g.*, *In re Application of KUTV Licensee, LLC to HSH St. George (KMYU) Licensee*, File No. BALCDT-20180426ABQ (filed May 1, 2018), Attachment 5 (Form of Option Agreement and Option Asset Purchase Agreement ("Option Agreement")).

[55] *See* 47 C.F.R. § 73.1150(a) ("[i]n transferring a broadcast station, the licensee may retain no right of reversion of the license, no right to reassignment of the license in the future, and may not reserve the right to use the facilities of the station for any period whatsoever"). The Commission has consistently refused to grant applications for transfer of control where the former owner retains "a right or a power to regain the status of licensee through a reversion of stock control or the reassignment of the station license." *Radio KDAN, Inc.*, 11 FCC 2d 934 (1968), *recon. denied*, 13 RR 2d 100 (1968), *aff'd sub nom., W.H. Hansen v. FCC*, 413 F.2d 374 (D.C. Cir. 1969). This includes instances where the transferee grants the transferor a right of first refusal to acquire the station(s) beings sold. *In re Cumulus Licensing LLC*, 21 FCC Rcd. 2998, 3005 (2006). The Stirk Option Agreement grants Sinclair the option to purchase the transferred station at any time prior to the expiration of the option. *See* Option Agreement ¶¶ 1-2. The option does not expire until eight years from the date of the Agreement, and Sinclair has the right to extend the Option for up to *forty* additional years. *See id.* ¶ 2(b). The Option Agreement also grants Sinclair an effective right of first refusal. *See id.* ¶ 10.j. (requiring the transferee "not to transfer or cause to be transferred any of the Assets, Equity and its beneficial ownership interest therein during the term of this Agreement *except as permitted by this Option*[.]" (emphasis added).

[56] *Edwin L. Edwards, Sr. (Transferor) and Carolyn C. Smith (Transferee)*, Memorandum Opinion and Order and Notice of Apparent Liability, 16 FCC Rcd. 22,236, 22,250 ¶ 26 (2001) (finding that petitioners had "set forth specific allegations of fact sufficient to show that certain of the current transactions in this proceeding have resulted

"a reasonable businessman" would not have agreed to the transactions orchestrated by Sinclair.[57] A similar review is warranted here.

Close Commission scrutiny is also necessary given Sinclair's track record of exerting control over retransmission consent negotiations of stations with whom it has a business relationship, notwithstanding rules directly prohibiting it from doing so.[58] As the Commission is well aware, Sinclair has previously used JSAs, SSAs, and LMAs as an end-run around the statutory ban on joint retransmission consent negotiations by stations that are not under common *de jure* control.[59] In 2016, upon a finding by the Media Bureau that Sinclair "negotiated retransmission consent on behalf of, or coordinated negotiations with, a total of 36 Non-Sinclair Stations,"[60] Sinclair entered into a consent decree with the Bureau in which Sinclair made a settlement payment of nearly $9.5 million. The Commission must ensure that the planned divestitures and associated service agreements in the pending Tribune transaction do not lead to a similar outcome.

IV. CONCLUSION

Sinclair's ownership of two top-four stations in St. Louis and Indianapolis will give it demonstrably greater market power in the negotiation of retransmission consent agreements, resulting in higher costs that will be passed on to consumers. This negotiating leverage will be further exacerbated by Sinclair's unprecedented national footprint. Sinclair has provided no evidence of public interest benefits that would outweigh this substantial, transaction-specific

in Sinclair exercising *de facto* control over [Cunningham Broadcasting, then doing business as Glencairn] in violation of Section 310(d) of the Communications Act.").

[57] *See id.*

[58] *In re Sinclair Broadcast Group, Inc.*, Order, 31 FCC Rcd. 8576 (MB 2016) ("*Consent Decree*").

[59] *See* 47 U.S.C. § 325 (b)(3)(C)(iv); 47 C.F.R. § 76.65(b). NCTA identified this risk in its Reply Comments in this proceeding. *See* NCTA Reply Comments at 4.

[60] *Consent Decree* ¶ 4.

harm. The Commission should reject Sinclair's request to own two top-four stations in St. Louis and Indianapolis. Additionally, to avoid extending Sinclair's reach beyond the stations it will own post-transaction, the Commission should ensure that the proposed divestitures are actually arms-length transactions that give the purchasers *de facto* as well as *de jure* control of the affected stations. The Commission should also monitor the stations for ongoing compliance with the rules if the sales are approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael S. Schooler, hereby certify that, on this 20th day of June, 2018, I caused a copy of the foregoing *Comments of NCTA* to be filed electronically with the Commission through the ECFS system and caused a copy of the foregoing to be served upon the following individuals by electronic mail:

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/s/ Michael S. Schooler

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ATTACHMENT A

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Tribune Media Company	)	**MB Docket No. 17-179**
(transferor)	)	
	)	
and	)	
	)	
Sinclair Broadcast Group, Inc.	)	
(Transferee)	)	
	)	
Consolidated Applications for Consent to	)	
Transfer Control	)	

BRYAN KEATING AND JON ORSZAG

June 20, 2018

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I. INTRODUCTION

1. In April 2018, Sinclair Broadcast Group, Inc. ("Sinclair") and Tribune Media Company ("Tribune") (collectively "Applicants") filed an amendment to their application seeking Commission consent to modify their proposed merger.[1] In this amendment, Applicants state that they will divest one or more stations in nine DMAs, including a top-four broadcast station in eight DMAs.[2] Applicants also request consent to own two top-four broadcast stations in two DMAs: St. Louis, Missouri and Indianapolis, Indiana.[3]

2. For purposes of this request, Applicants purport to apply the Federal Communication Commission's ("Commission") recent guidance in the 2017 *Reconsideration Order* with respect to its prohibition on common ownership of multiple top-four broadcast stations within a DMA (the "Top-Four Prohibition"). While noting that "[t]he ratings data in the record generally supported the Commission's line drawing, and the potential harms associated with top-four combinations find support in the record," the Commission allows for the possibility that the top-four prohibition may not be warranted in all markets. The Commission therefore provided an opportunity for applicants to make a case-by-case showing that prohibiting a single owner of two top-four broadcast stations

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1 *Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc.*, MB Docket No. 17-179, Amendment to FCC Form 315, April 2018 (hereinafter *Sinclair Amendment*).

2 Seattle-Tacoma, Washington; St. Louis, Missouri; Salt Lake City, Utah; Oklahoma City, Oklahoma; Greensboro-High Point-Winston Salem, North Carolina; Grand Rapids-Kalamazoo-Battle Creek, Michigan; Richmond-Petersburg, Virginia; Des Moines-Ames, Iowa; and Harrisburg-Lancaster-Lebanon-York, Pennsylvania.

3 *Sinclair Amendment*, § II.B.

in the same market would be unwarranted.[4] To make such a showing, "applicants must demonstrate that the benefits of the proposed transaction would outweigh the harms, and we will undertake a careful review of such showings in light of the record with respect to each such application."[5]

3. The Commission invites applicants to submit information including, *but not limited to*, the following categories:[6]

1) ratings share data of the stations proposed to be combined compared with other stations in the market;
2) revenue share data of the stations proposed to be combined compared with other stations in the market, including advertising (on-air and digital) and retransmission consent fees;
3) market characteristics, such as population and the number and types of broadcast television stations serving the market (including any strong competitors outside the top-four rated broadcast television stations);
4) the likely effects on programming meeting the needs and interests of the community; and
5) any other circumstances impacting the market, particularly any disparities primarily impacting small and mid-sized markets.

The Commission declined to articulate "a rigid set of criteria for our case-by-case analysis,"[7] but it acknowledged that parties could raise concerns related to retransmission

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[4] *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules et al.*, MB Docket Nos. 14-50 et al., Order on Reconsideration and Notice of Proposed Rulemaking, November 20, 2017 (hereinafter *Reconsideration Order*), ¶¶ 78-82.

[5] *Reconsideration Order*, ¶ 82.

[6] *Reconsideration Order*, ¶ 82.

[7] *Reconsideration Order*, ¶ 82.

consent issues in the context of a specific transaction "if such issues are relevant to the particular market, stations, or transaction."[8]

4. We have been asked by counsel for the National Cable & Telecommunications Association ("NCTA") to review and respond, from an economic perspective, to the arguments that Applicants advance as to why they should be permitted to own two top-four broadcast stations in St. Louis, Missouri and Indianapolis, Indiana. We focus especially on the effects of the proposed transaction as it relates to retransmission consent negotiations. For the reasons set out below, we conclude that the proposed transaction would put upward pressure on retransmission consent fees in both St. Louis and Indianapolis as well as nationally.

II. THE ECONOMICS OF RETRANSMISSION CONSENT NEGOTIATIONS

5. Broadcast station/multichannel video programming distributor ("MVPD") retransmission arrangements are complex and have evolved over time with different regulatory and marketplace developments. For purposes of the stations at issue in this transaction, the negotiations typically proceed via a retransmission consent regime by which the broadcast station owner or operator must consent to the retransmission of its station signal by the MVPD and generally does so only for valuable consideration. In this section, we briefly review the relevant economics of bargaining. We then discuss that theory in the context of evaluating the effects of the proposed transaction.

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[8] *Id.*, n. 239.

6. In economic terms, a retransmission consent negotiation between a buyer (in this case, an MVPD) and a seller (in this case, a broadcast station owner or operator) can be thought of as a negotiation over how the two parties divide the total pool of incremental profit that is generated as result of collaboration. For the broadcast station owner or operator, the gains from collaboration take the form of incremental profits from fees and additional advertising revenue earned because its signal reaches a wider audience when distributed to the MVPD's subscribers. For the MVPD, the gains from collaboration take the form of incremental profits associated with additional subscriber revenue from customers added or retained because they are attracted by the programming the broadcaster offers.

7. Rather than each party simply retaining these direct benefits, retransmission consent negotiations allow the parties to split the overall pool of surplus in a more flexible way. The exact division between MVPD and broadcaster will be determined by each party's relative bargaining positions and will be bound by the profits each party could earn absent an agreement. Each party has an economic incentive to come to a retransmission consent agreement as long as the profits it will receive under the agreement exceed the profits it would receive if no agreement were reached. In the bargaining terminology used in the economics literature, the latter are referred to as "disagreement points" or "disagreement profits." When the profits available under an agreement exceed the parties' disagreement points, the agreement is economically efficient and both parties have an incentive to reach agreement.

8. The effect that a merger between sellers (here broadcast stations) has on their bargaining power depends on technical conditions, such as the "concavity" or shape of

the buyers' surplus functions (i.e., the way in which the surplus function changes with the amount of content available). If the per-customer benefit to an MVPD of carrying a broadcast station decreases as the number of broadcast signals the MVPD carries increases, as could be the case if the additional station offers substitutable programming to the MVPD's current lineup and therefore adds relatively little incremental value, then the surplus function is said to be "concave." Conversely, if the per-customer benefit to an MVPD of carrying a broadcast station increases as the number of broadcast signals the MVPD carries increases, as could be the case if the added station offers complementary programming to the MVPD's existing lineup, then the surplus function is not concave, but rather said to be "convex." And if the per-customer benefit does not depend on the number of stations, then the surplus function is said to be "linear."

9. Under standard economic models, if an MVPD's surplus function is concave, a merger of broadcast station owners will enhance the bargaining power of the combined firm vis-à-vis that MVPD. The retransmission fees that sellers can negotiate are tied to the value they create for the MVPD, meaning that stations contributing relatively higher value are in stronger positions to command higher fees than those contributing relatively lower value. With concave surplus functions, each additional station adds ***less*** value to the MVPD than the prior station, with the marginal station (i.e., the final station added in a negotiation) contributing the least incremental value. If the marginal seller in this scenario combines with another station and negotiates jointly, it would improve its value to the MVPD (because the two stations together would offer a higher average incremental value than would the marginal station on its own) and would be able to negotiate a better (higher) price.

10. The reverse is true in the case of a convex surplus function. Where MVPDs have a convex surplus function, a merger between broadcast station owners would shift bargaining power away from the combined firm to the MVPD and ***decrease*** the price paid by the MVPD to carry the broadcast signals. This is true because, with a convex surplus function, each additional seller contributes ***more*** value to the MVPD than the prior station. In this case, the marginal seller contributes ***greater*** incremental value than other stations and will be able to negotiate a better (higher) price if it negotiates separately.

11. The following numerical example illustrates these concepts.[9] Consider a situation in which an MVPD negotiates with two broadcast station owners.[10] The top panel of Table 1 describes the various bargaining outcomes in this scenario. For the MVPD, reaching agreements with both station owners will generate $70 in incremental profit ($120-$50).[11] But the incremental gain to reaching agreement with either, conditional on reaching agreement with the other, is only $20 ($120-$100). Splitting the incremental surplus with the broadcast owner implies a fee of $10 per station (or $20 in total for both stations). Now consider the outcome when the two broadcaster owners merge or otherwise negotiate jointly. As illustrated in the bottom panel of Table 1, the MVPD

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9 See Aviv Nevo, "Mergers that Increase Bargaining Leverage," Remarks as Prepared for the Stanford Institute for Economic Policy Research and Cornerstone Research Conference on Antitrust in Highly Innovative Industries, January 22, 2014, *available at* https://www.justice.gov/atr/file/517781/download for a similar example.

10 This numerical example is agnostic as to whether the station owner's own stations in the same or different DMAs.

11 For simplicity, we assume in this example that there is no incremental profit for the broadcast station owner.

again gains $70 if it has an agreement with both (the joint company) relative to not reaching an agreement. Following the merger, the joint company is the marginal seller, and in this example the value ($70) it creates exceeds the value (2 x $20) that the stations create on a stand-alone basis pre-merger. Assuming an equal split of the incremental surplus, it implies a payment of $35 (or $17.50 per station). In this example, joint negotiation does not increase the overall profit to the MVPD of reaching agreement with both broadcasters but it does increase the fees that the MVPD pays relative to separate negotiations.

Table 1: Numerical Example of Bargaining

Pre-merger

	MVPD Profit	Incremental Gain to MVPD	Individual Broadcaster Share of Surplus*	Broadcasters A+B Share of Surplus*
Agreement with neither	$50			
Agreement with one broadcaster only	$100	$50		
Agreement with both	$120	$20	$10	$20

Post-merger

	MVPD Profit	Incremental Gain to MVPD	Broadcasters A+B Share of Surplus*
Agreement with neither	$50		
Agreement with both	$120	$70	$35

Notes:
* Assumes equal bargaining power (a 50/50 split of the incremental gain between MPVDs and broadcasters)

12. The outcome described above arises from the fact that the incremental surplus to the MVPD decreases as more broadcasters are included in the MVPD's offerings (as shown in the first panel in Table 1, the incremental gain decreases from $50 when adding one broadcaster to $20 when adding a second). This example provides a numerical demonstration of a concave demand curve.

13. Local-market overlaps represent a particular example of the general bargaining theory described above. If subscribers view certain local broadcast stations as at least

partial substitutes for one another, then subscribers may be more inclined to stay with an MVPD even if it fails to reach an agreement with a particular viewer's preferred broadcast station as long as it has reached agreement with other stations in the market. However, if an MVPD loses access to multiple stations, there is a greater chance some customers will cancel their MVPD subscription in search of an alternative MVPD offering more robust alternatives. This scenario applies with particular force to negotiations with top-four broadcast network affiliates. Such stations are typically the most popular networks, and subscribers are likely to view the networks as partial substitutes for one another. More colloquially, MVPDs are disproportionately worse off with only two of the top-four broadcast stations in a DMA than with three of the four broadcast networks.

14. The economic logic for why combining competing stations within a market under common ownership shifts bargaining power to the merging firm is therefore analogous to the standard intuition underlying horizontal unilateral effects analysis of mergers involving differentiated products in posted-price settings. In such cases, absent efficiencies or other merger-related benefits, economic theory makes the unambiguous prediction that the merger will enhance the bargaining power of broadcast stations relative to MVPDs.[12]

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[12] By increasing the surplus associated with reaching a deal, merger-specific marginal cost efficiencies, if sufficiently large, could create an incentive to lower rates. To our knowledge, the merging parties have not demonstrated any significant merger-specific marginal cost efficiencies (see Section V).

15. The likely increases in retransmission consent fees arising from the proposed transaction, as described further below and to the extent that they are not remedied by divestitures, would exacerbate existing trends. Over the past decade, total retransmission consent fees have grown substantially, from about $200 million in 2006 to about $8 billion in 2016 (and are projected to reach $10 billion in 2018).[13]

III. SINCLAIR'S EVIDENCE IS INSUFFICIENT TO DEMONSTRATE THAT THE BENEFITS OF THE PROPOSED TRANSACTION OUTWEIGH THE HARMS

16. The Commission's modification to its prohibition on common ownership of top-four broadcast stations within a DMA to allow for case-by-case analysis places the burden on applicants to "demonstrate that the benefits of the proposed transaction would outweigh the harms."[14] Because Applicants ignore the effects of the transaction on retransmission consent fees, they have failed to make the required showing and the Commission cannot conclude that the competitive harm of these combinations is "minimal" and outweighed by "public interest benefits."[15]

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[13] See Justin Nielson, "Retrans projections update: $12.8B by 2023," *SNL Kagan Broadcaster Investor*, June 14, 2017.

[14] *Reconsideration Order*, ¶ 82.

[15] *See id.*

A. SINCLAIR INCORRECTLY DISMISSES THE EFFECT OF THE TRANSACTION ON RETRANSMISSION CONSENT FEES

17. Applicants' supplemental filing focuses mainly on the effects of the proposed transaction on advertising sales. It dismisses the relevance of the transaction to retransmission consent negotiations:[16]

> Retransmission consent agreements for larger television groups such as Tribune, Sinclair, Nexstar and others are negotiated on a national, not a local, level and therefore local retransmission revenues do not reflect competition in the market. *Rates, and revenues, are not a result of competition between individual stations in a market and are largely dependent on a number of factors*, including competition from cable networks, timing of when a retransmission consent agreement was entered into (a recently entered into agreement is likely to have higher rates), length of term, and other rights negotiated in the agreement—*that are wholly unrelated to local broadcast station competition or any particular station being examined*.

The implication that local competitive conditions have no effect on retransmission consent negotiations is inconsistent with sound economics.

18. For the theoretical reasons discussed in Section II above, elimination of horizontal competition between broadcast stations within a local market would put upward pricing pressure on retransmission consent rates. The fact that large broadcast station owners such as Sinclair and Tribune negotiate rates across multiple markets does not change this basic logic. Rates set at a national level reflect the economic implications of local competitive

16 *Sinclair Amendment*, n. 32 [emphasis added].

conditions, along with other factors relevant to pricing, in the markets to which the rates are applicable.[17]

19. Citing similar economic logic, the Department of Justice (DOJ) previously found that the Nexstar-Media General transaction would diminish competition where the two broadcast station owners owned stations in the same DMA:[18]

> Prior to the merger, an MVPD's failure to reach a retransmission agreement with Nexstar for a broadcast television station might result in a blackout of that station and threaten some subscriber loss for the MVPD. But because the MVPD would still be able to offer programming on Media General's major network affiliates, which are at least partial substitutes for Nexstar's affiliates, many MVPD subscribers would simply switch stations instead of cancelling their MVPD subscriptions. After the merger, an MVPD negotiating with Nexstar over a retransmission agreement could be faced with the prospect of a dual blackout of major broadcast networks (or worse), a result more likely to cause the MVPD to

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[17] To take a simple example, consider a case in which one merging party owns a top-four broadcast station in one DMA, and the other party owns an equally sized top-four station in another DMA. In a third DMA, both parties each own a station. For the reasons discussed herein, the combination of two top-four broadcast stations within the third DMA would put upward pressure on retransmission consent fees in the overlap market. Assuming the merged party jointly negotiated a common rate for the all three DMAs, the combination of competing stations within the third DMA would put upward pressure on the common negotiated fee. In establishing the profit-maximizing common rate, the firm would balance the fact that the merger would increase the profit-maximizing market-specific rate in the overlap market while leaving unchanged (ignoring cross-market effects) the profit-maximizing market-specific rates in the overlap markets. The resulting percentage increase in the fee would reflect the aggregate effect of the merger across all markets to which the common rate applies. While the aggregate rate would be lower in the overlap DMA than if rates were negotiated on a DMA-specific basis, it would be higher in the other markets than would otherwise be the case and this higher rate would apply to a larger number of subscribers.

[18] *United States of America v. Nexstar Broadcasting Group, Inc. and Media General, Inc.*, Competitive Impact Statement, September 2, 2016, *available at* https://www.justice.gov/atr/case-document/file/910661/download, pp. 8-9 ("*Nexstar Competitive Impact Statement*").

> lose subscribers and therefore to accede to Nexstar's retransmission fee demands.

20. Because retransmission fees constitute marginal costs to an MVPD, as a matter of economics, MVPDs have an incentive to pass on part or all of any such increases in marginal costs to the end consumer.[19] Further increases in retransmission consent fees, which would exacerbate the underlying trend in these fees, would ultimately harm consumers.

21. Data that DISH Network submitted in this docket supports the conclusion that combining competing stations within a DMA under common ownership would shift bargaining power toward the broadcast station owner. Specifically, in an economic declaration attached to DISH Network's FCC filing, Mr. Zarakas and Dr. Verlinda find:[20]

> DISH suffers greater subscriber losses when it temporarily loses programming from (i.e., is blacked out by) broadcast groups with two or more local broadcast stations in a DMA than it does when programming is temporarily lost for only one station in a DMA.

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19 The Department of Justice reached a similar conclusion in its review of the Nexstar-Media General transaction. *See Nexstar Competitive Impact Statement* at 9 ("the loss of competition between the Nexstar and Media General stations in each DMA Market would likely lead to an increase in retransmission fees in those markets and, because increased retransmission fees typically are passed on to consumers, higher MVPD subscription fees.").

20 *Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc.*, MB Docket No. 17-179, Petition to Dismiss or Deny of DISH Network, L.L.C. ("DISH"), Aug. 7, 2017, Exhibit E, Declaration of William P. Zarakas and Jeremy A. Verlinda, ¶ 4.

Such an empirical finding is consistent with the theoretical conclusion that an MVPD's surplus function is concave and consequently that a merger of two broadcast stations in the same market would put upward pressure on retransmission consent fees.[21]

B. THE TRANSACTION WOULD PUT UPWARD PRESSURE ON RETRANSMISSION CONSENT FEES IN ST. LOUIS, MISSOURI AND INDIANAPOLIS, INDIANA

22. In both St. Louis, Missouri and Indianapolis, Indiana, Sinclair seeks a waiver of the Commission's prohibition of common ownership of two top-four broadcast stations. As we discuss below, such a waiver would put upward pressure on retransmission consent fees to the detriment of consumers.

1. St. Louis, Missouri

23. In St. Louis, Missouri, a subsidiary of Sinclair is the licensee of the ABC affiliate, KDNL. A subsidiary of Tribune is the licensee of the Fox affiliate, KTVI, as well as the licensee of the CW affiliate, KPLR.

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[21] This finding was critiqued by Dr. Gowrisankaran, in an economic report attached to Sinclair's filing, who claimed that the results presented by Mr. Zarakas and Dr. Verlinda are evidence of convexity rather than concavity (see *Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc.*, MB Docket No. 17-179, Applicants' Consolidated Opposition to Petitions to Deny, Aug. 22, 2017, Exhibit E, Declaration of Gautam Gowrisankaran, ¶¶ 78-84). However, Dr. Gowrisankaran's interpretation appears to be incorrect because he did not account for the fact that the blackouts studied by Mr. Zarakas and Dr. Verlinda involved losses of a Big-Four station and a non-Big-Four station rather than two Big-Four stations. Adjusting for relative station size, Mr. Zarakas and Dr. Verlinda's analysis implies that the loss of two Big-Four stations exceeds the loss of one, which is consistent with concavity. (See *Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc.*, MB Docket No. 17-179, Reply of DISH Network, L.L.C. ("DISH"), Aug. 29, 2017, Exhibit C, Declaration of Dr. Janusz A. Ordover, ¶ 39.).

24. Applicants advance several arguments as to why they should be allowed to own two top-four stations in St. Louis, Missouri:[22]

- "Common ownership of KTVI and KDNL-TV will serve to strengthen broadcast competition with cable TV;"
- "Viewers have access to more than 10 Significantly Viewed stations from neighboring DMAs such as Terre Haute, IN, Springfield, MO, and Champaign-Springfield-Decatur, IL. These stations include Top-Four stations owned by Nexstar Media Group, Raycom Media, and Quincy Media. Several of the stations' signal contours overlap the St. Louis DMA and can therefore be picked up by viewers over the air regardless of which cable systems also carry them;" and
- "The merger of KDNL-TV's newsroom with the KTVI newsroom would enable Sinclair to leverage Tribune's existing news operations to add news in the DMA."

As we discuss further below, these facts are not unique to St. Louis nor do they establish that the benefits to allowing common ownership of two top-four stations would outweigh the harms. For example, while Applicants point to the existence of competing options, they do nothing to quantify the extent to which the proposed transaction would affect prices as a function of that competition.

25. Table 2 shows that, based on retransmission consent revenue, KTVI and KDNL are the fourth- and first-ranked broadcast stations, respectively. The Hirschman-Herfindahl Index (HHI) is a standard measure of market-level concentration that naturally

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[22] *Sinclair Amendment*, pp. 15-16.

takes into account the strength of other competing options. Calculating the HHI based on retransmission consent revenue yields a post-merger HHI of 3,754 and a delta HHI (the increase in concentration from combining the Sinclair and Tribune stations) of 1,191, based on 2017 data from SNL Kagan.[23] These values exceed the thresholds by which the Horizontal Merger Guidelines consider a merger to be presumptively anticompetitive.[24]

Table 2: Retransmission Revenue Consent Fees, St. Louis, Missouri

			SNL Kagan (2017)		BIA Kelsey (2016)	
Station	**Affiliation**	**Owner**	**Retrans Revenue ($000s)**	**Retrans Rev Share**	**Retrans Revenue ($000s)**	**Retrans Rev Share**
KMOV	CBS	Meredith Corporation	$21,014	25.3%	$15,100	26.1%
KSDK	NBC	TEGNA Inc.	$20,522	24.7%	$18,600	32.2%
KTVI	FOX	Tribune Media Company	$13,813	16.6%	$14,600	25.3%
KDNL-TV	ABC	Sinclair Broadcast Group, Inc.	$25,525	30.7%	$7,500	13.0%
KPLR-TV	The CW	Tribune Media Company	$2,339	2.8%	$2,000	3.5%
Combined Sinclair-Tribune Share				50.1%		41.7%
Post HHI				3754		3457
Delta HHI				1191		745

Source: *Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc.* , MB Docket No. 17-179, Amendment to FCC Form 315, April 2018, Exhibit F.2 (BIA Kelsey, 2016 and SNL Kagan, 2017)

26. It is our understanding that Sinclair has agreed to divest one station in St. Louis, but it has not determined which station it will divest. Specifically, in a recent filing, Sinclair stated:

> Because the parties will not know which of these Stations will be divested until the Department of Justice, Antitrust Division, approves a proposed buyer for KPLR-TV or, if no buyer is approved for KPLR-TV, a proposed buyer for KDNL-TV, the parties are filing applications seeking consent to

23 The most recent data from BIA Kelsey yields similar estimates.

24 *Horizontal Merger Guidelines*, § 5.3.

For purposes of these calculations, we assume joint ownership of all three Sinclair and Tribune stations. Below, we consider potential divestiture scenarios.

assign or transfer each of the Stations to the Trust pending completion of such review.

Here we consider the implication of two potential divestiture scenarios:

- Scenario 1: Divest KPLR-TV.
- Scenario 2: Divest KDNL-TV.

27. Table 3 shows the post-merger HHI values for both proposed divestitures. A divestiture of KDNL, the station currently under Sinclair ownership, would effectively transfer the two Tribune-owned stations to Sinclair. There would be no change in the St. Louis post-merger HHI, as shown by the delta HHI values of 0. Under this scenario, the post-merger HHI using retransmission fee data from SNL Kagan is 2,564. If Sinclair divests KPLR, the post-merger HHI using SNL Kagan data is 3,489 with a delta HHI of 925.

Table 3: Summary of Divestiture Scenarios, St. Louis, Missouri

	SNL Kagan (2017)			BIA Kelsey (2016)		
Divestiture Option	**Combined Sinclair-Tribune Share**	**Post HHI**	**Delta HHI**	**Combined Sinclair-Tribune Share**	**Post HHI**	**Delta HHI**
No Divestiture	50.1%	3754	1191	41.7%	3457	745
Divest KDNL	19.4%	2564	0	28.7%	2711	0
Divest KPLR	47.3%	3489	925	38.2%	3192	481

Source: *Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc.* , MB Docket No. 17-179, Amendment to FCC Form 315, April 2018, Exhibit F.2 (BIA Kelsey, 2016 and SNL Kagan, 2017)

2. Indianapolis, Indiana

28. In Indianapolis, a subsidiary of Tribune is the licensee of the local CBS affiliate (WTTV) and the local Fox affiliate (WXIN).[25] Sinclair does not currently operate a station in the DMA. The merger will not cause a change in the common ownership status of these stations. Nonetheless, a divestiture of one of the Tribune top-four stations would increase competition among broadcast stations in the DMA.

29. Table 4 also shows that, based on retransmission consent revenue, WXIN and WTTV are the second- and third-ranked broadcast stations in the DMA. Calculating an HHI based on retransmission consent revenue yields an HHI when combining the two Tribune stations of 3,068. Divesting one of the Tribune stations would reduce HHI by 1,062 to 2,006, based on 2017 data from SNL Kagan.[26, 27] The combined HHI exceeds the thresholds by which the Horizontal Merger Guidelines consider a merger to be presumptively anti-competitive.[28]

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25 Tribune has commonly owned the stations since 2002 and they became a top-four overlap in 2015 when WTTV switched its affiliation from CW to CBS. (*Sinclair Amendment,* n. 48.)

26 The most recent data from BIA Kelsey yields somewhat smaller, but still large, estimates.

27 HHIs can be used to compare concentration in different scenarios. In this case, the HHI calculations we present compare concentrations with WTTV and WXIN either jointly or separately owned.

28 *Horizontal Merger Guidelines*, § 5.3.

Table 4: Retransmission Revenue Consent Fees, Indianapolis, Indiana

			SNL Kagan (2017)		BIA Kelsey (2016)	
Station	**Affiliation**	**Owner**	**Retrans Revenue ($000s)**	**Retrans Rev Share**	**Retrans Revenue ($000s)**	**Retrans Rev Share**
WTHR	NBC	Dispatch Printing Company, The	$18,649	23.3%	$13,400	30.2%
WISH	The CW	Nexstar Media Group, Inc.	$6,367	7.9%	$2,100	4.7%
WXIN	FOX	Tribune Media Co.	$18,524	23.1%	$12,500	28.2%
WRTV	ABC	E. W. Scripps Company	$14,249	17.8%	$11,300	25.5%
WTTV	CBS	Tribune Media Co.	$18,436	23.0%	$4,000	9.0%
WNDY	MyNetworkTV	Nexstar Media Group, Inc.	$3,974	5.0%	$1,000	2.3%
Combined Sinclair-Tribune Share				46.1%		37.2%
HHI (Combined Tribune Stations)				3068		2980
Delta HHI (From Divesting One Tribune Station)				-1062		-510
HHI (Separate Tribune Stations)				2006		2471

Source: *Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc.* , MB Docket No. 17-179, Amendment to FCC Form 315, April 2018, Exhibit F.1 (BIA Kelsey, 2016 and SNL Kagan, 2017)

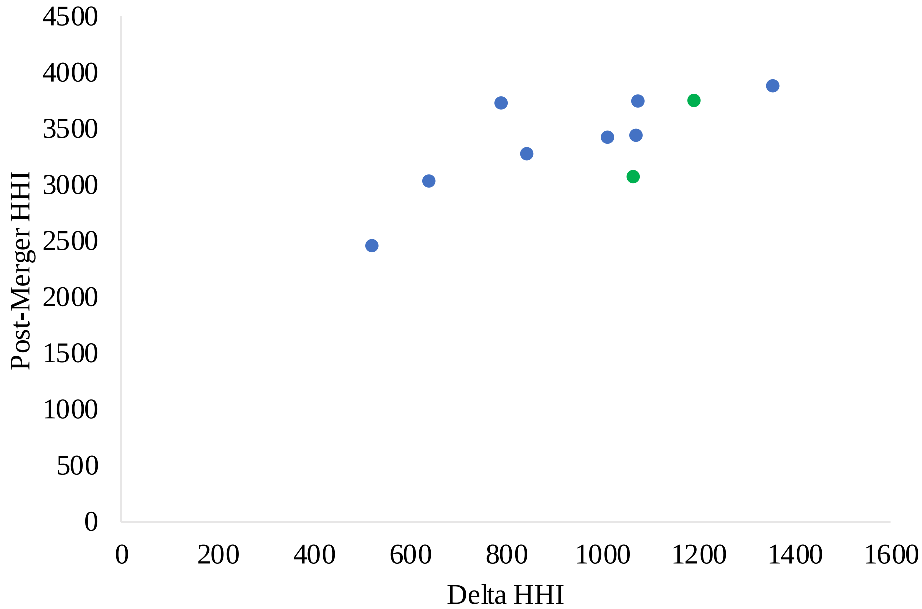
C. THE RETRANSMISSION CONSENT FEE IMPACT IN ST. LOUIS, MISSOURI AND INDIANAPOLIS, INDIANA IS ESSENTIALLY IDENTICAL TO THE IMPACT IN THE DIVESTITURE DMAS

30. Although Applicants seek modification to the Commission's top-four ownership provisions for St. Louis, Missouri and Indianapolis, Indiana while agreeing to divestitures of a top-four station in eight other DMAs, neither St. Louis, Missouri nor Indianapolis, Indiana is a material outlier with respect to the concentration of broadcast stations within the DMA.[29]

31. Figure 1 shows that both St. Louis, Missouri and Indianapolis, Indiana (green dots) lie in the middle of the range of concentration based on retrans revenue among the ten DMAs with a top-four overlap.

[29] The eight DMAs in which Applicants have agreed to a divestiture of a top-four broadcast station are: Seattle-Tacoma, Washington; Greensboro-High Point-Winston Salem, North Carolina; Salt Lake City, Utah; Oklahoma City, Oklahoma; Grand Rapids-Kalamazoo-Battle Creek, Michigan; Richmond-Petersburg, Virginia; Des Moines-Ames, Iowa; Harrisburg-Lancaster-Lebanon-York, Pennsylvania.

Figure 1: Concentration in Top-Four Overlap DMAs (Retrans Revenue)



Source: SNL Kagan, 2017

32. The fact that these two DMAs look similar to DMAs in which Applicants have agreed to divest a top-four broadcast station demonstrates that Applicants lack a sound economic foundation for seeking a modification to the Commission's top-four ownership rules in these two DMAs.

33. Applicants' additional arguments about competition with cable systems are not unique to these two DMAs. While we do not undertake a systematic analysis of the degree of substitution between broadcast networks and cable networks, we note that cable networks exist throughout the country, including in the DMAs where Applicants have agreed to divest a top-four station.

IV. THE TRANSACTION WOULD INCREASE THE COMBINED FIRM'S BARGAINING POWER DUE TO AN INCREASE IN NATIONAL FOOTPRINT

34. The prior discussion focuses on the effects arising from diminution of local-market competition, especially in St. Louis and Indianapolis. The proposed transaction also potentially affects retransmission consent negotiations by increasing the footprint of the combined company. Although the theoretical literature on bargaining makes no clear predictions about the effect of cross-market mergers on the bargaining power of the merging parties, it demonstrates that such mergers can, under certain circumstances, influence the relative bargaining power of the combined entity.[30] Ultimately, the degree to which a merger affects the bargaining situation—and the direction of the influence—is case-specific and can be addressed only with empirical evidence.

35. There are reasons to believe that, in this industry, broadcaster size is positively correlated with broadcaster bargaining power. For example, a threatened blackout across a substantially larger portion of an MVPD's footprint has the prospect to impose disproportionately higher costs on the MVPD in dealing with the repercussions of the blackout. Such costs may take the form of disproportionately higher customer service costs or disproportionately higher costs to the brand as a result of adverse publicity from

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[30] *See*, e.g., Tasneem Chipty and Christopher M. Snyder (1999), "The Role of Firm Size in Bilateral Bargaining: A Study of the Cable Television Industry," *The Review of Economics and Statistics*, 81: 326-340; Alexander Raskovich (2003), "Pivotal Buyers and Bargaining Position," *The Journal of Industrial Economics*, LI(4): 405-426; Nodir Adilov and Peter J. Alexander (2006), "Horizontal Merger: Pivotal Buyers and Bargaining Power," *Economics Letters*, 91: 307-311).

the blackout. Such costs place the MVPD in a weaker bargaining position (effectively, they create a concave surplus function) and create an incentive to agree to higher retransmission consent fees in order to avoid incurring those costs.

36. Even though the top-four combination in Indianapolis predates the transaction, transfer of the ownership of this combination to Sinclair, with its substantially larger national footprint than Tribune, raises merger-specific harms.[31]

37. Data that DISH Network submitted in the FCC docket demonstrate that such a pattern prevails in DISH Network's retransmission consent agreements with broadcast station owners. Specifically, in an economic filing attached to DISH Network's FCC filing, Professor Janusz Ordover finds:[32]

> My regression results indicate that retransmission fees increase with the size of the station owner, which confirms the supposition that DISH's surplus function is concave. The further implication is that the merger of Sinclair and Tribune will shift bargaining power toward the New Sinclair, likely resulting in higher retransmission fees.

38. Contrary to the empirical evidence presented by DISH Network, Dr. Gowrisankaran asserted in a filing to the FCC on behalf of Sinclair and Tribune that MVPDs' surplus function is likely to be linear across markets and therefore that the

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31 *See Reconsideration Order*, ¶ 82 n. 239 (recognizing appropriateness of raising concerns related to retransmission consent issues in the context of a specific transaction "if such issues are relevant to the particular market, stations, or transaction.").

32 *Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc.*, MB Docket No. 17-179, Petition to Dismiss or Deny of DISH Network, L.L.C. ("DISH"), Aug. 7, 2017, Exhibit D, Declaration of Dr. Janusz A. Ordover, ¶ 41.

merger would not have impact on retransmission rates.[33] As discussed above, because economic theory gives no clear guidance on the directional effects of cross-market mergers, the question must be answered by empirical evidence. However, Dr. Gowrisankaran offered no empirical evidence to substantiate this view and it runs contrary to other available evidence.[34] Given that Dr. Gowrisankaran's claim is unsupported by any empirical evidence (and contradicts the available evidence) and given the potential risks of a firm owning multiple top-four stations, Sinclair and Tribune have clearly not demonstrated the *net benefits* of common ownership of these stations.

V. CONCLUSION

39. For the reasons described above, both economic theory and the empirical evidence strongly support the conclusion that the proposed transaction would increase retransmission consent fees.

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33 See *Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc.*, MB Docket No. 17-179, Petition to Dismiss or Deny of DISH Network, L.L.C. ("DISH"), Aug. 7, 2017, Exhibit D, Declaration of Dr. Janusz A. Ordover, ¶ 41; *Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc.*, MB Docket No. 17-179, Applicants' Consolidated Opposition to Petitions to Deny, Aug. 22, 2017, Exhibit E, Declaration of Gautam Gowrisankaran, ¶ 60.

34 *Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc.*, MB Docket No. 17-179, Applicants' Consolidated Opposition to Petitions to Deny, Aug. 22, 2017, Exhibit E, Declaration of Gautam Gowrisankaran, ¶¶ 59-72.